No. 75-888 1

In The Supreme Court of The United States

OCTOBER TERM, 1975

JAMES H. CAMP, et al.,

Petitioners,

vs.

JAMES SCHLESINGER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners, JAMES H. CAMP, JOE B. THORNTON, GABRIEL MICK, PAUL A. WALKER, HENRY CHAMP, ALLEN J. THOMPSON, HARRY M. JONES, KENNETH M. PERRY, WILFRED I. STACEY, MELVIN E. PITTS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United states Court of Appeals for the Ninth Circuit entered in this proceeding on September 17, 1975.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 17, 1975. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, as retired veterans of the armed services, possessed earned and vested property rights under the Veterans' Preference Act of 1944.

2. Whether the Dual Compensation Act of 1964 discriminatorily deprives petitioners of their vested property rights and is therefore unconstitutional as being violative of the Due Process Clause of the Fifth Amendment.

PROCEDURE BELOW

Petitioners filed their Class Action Complaint For Injunctive and Declaratory Relief on January 2, 1970. The complaint prayed for a temporary restraining order prohibiting defendants from enforcing Section 202 of the Dual Compensation Act of 1964, 5 U.S.C. §§3501, 3502, 6303, 8116 and 8332; and that a three-judge court be convened pursuant to 28 U.S.C. §§2282 and 2284.

Upon a hearing of plaintiffs' complaint, without a hearing upon the merits of the complaint, Judge Edward J. Schwartz, on January 29, 1970, executed an order denying plaintiffs' prayer of a temporary injunction and denying the impaneling of a three-judge court. The order additionally dismissed the complaint.

An appeal was taken to the Ninth Circuit Court of Appeals, but due to some confusion, the matter was remanded to the district court with directions to vacate the order from which the appeal was taken and all subsequent orders.

On remand, the district court vacated all orders. On motion of defendants, the original complaint was dismissed. Plaintiffs' First Amended Class Action Complaint For Injunctive and Declaratory Relief was lodged on April 26, 1972, and ordered filed on July 10, 1972, by Judge Gordon Thompson, Jr.

The amended complaint can be summarized as follows:

1. Jurisdiction is alleged under 28 U.S.C. 1331 and 28 U.S.C. 1346;

2. Plaintiffs are retired military servicemen and representatives of a class of individuals similarly situated;

3. Defendants are various governmental and military authorities and are sued in their official capacities;

4. The gravamen of the amended complaint is the operation and effect of certain provisions of the Dual Compensation Act of 1964, P.L. 88-448, 78 Stat. 484, 5 U.S.C. §§3501, 3502, and 6303. It is alleged that the Dual Compensation Act of 1964 deprives plaintiffs of certain vested rights, previously conferred, without due process of law, in violation of the Fifth and Fourteenth Amendments;

5. The rights were conferred upon plaintiffs by the Veterans' Preference Act of 1944, P.L. 359, 58 Stat. 587, 5 U.S.C. §861, et seq. and were violated by the discriminatory severance and reduction in grade as a result of a general reduction in force at Naval Air Rework Facility, North Island, San Diego, California;

6. The amended complaint seeks:

(a) a restraining order;

(b) the convening of a three-judge district court to declare the 1964 Act constitutionally invalid; and

(c) damages.

The District Court concluded, based upon its findings, that the plaintiffs' constitutional claims were plainly insubstantial,

and thus the applications for a three-judge court and temporary restraining order should be denied. Further, since the entire complaint was based upon the aforesaid insubstantial constitutional claims, the complaint itself should be dismissed for failure to state a claim upon which relief may be granted.

TIMELY RAISING OF FEDERAL QUESTION

The complaint alleged jurisdiction, based on 28 U.S.C. 1331 and 28 U.S.C. 1348. Relief is prayed against the enforcement of the Dual Compensation Act of 1964 (Complaint, page 2) under 28 U.S.C. 2282 and 2284, and 28 U.S.C. 2201 and 2202 (Complaint, page 8). Please see attached Appendix A, Complaint, filed January 2, 1970.

STATUTORY PROVISIONS

The two major statutes involved are the following:

1. The Dual Compensation Act of 1964, Public Law 88-448, 78 Stat. 484, codified as 5 U.S.C. 3501 et seq. and 6303, 8116 and 8332. See Appendix B.

2. The Veterans' Preference Act of 1944, Public Law 359, 58 Stat. 387, codified as 5 U.S.C. 861 et seq. See Appendix C.

JUDGMENT TO BE REVIEWED

The judgment to be reviewed is the affirmation by the Court of Appeals on September 17, 1975, of the decision and the order by the District Court entered on November 10, 1972, whereby that court denied the impanelment of the three-judge court, denied the issuance of an injunction and dismissed the complaint for declaratory relief and damages. See Appendices D and E.

STATEMENT OF THE CASE

Petitioners are all retired military veterans who were engaged in federal civil service employment at the Naval Air Rework Facility, North Island, San Diego, California. When petitioners signed enlistment or re-enlistment contracts with the government, the Veterans' Preference Act of 1944, 78 Stat. 486, originally codified at 5 U.S.C. 861 et seq., was in existence. One purpose of this Act was to encourage servicemen to re-enlist repeatedly and thus give the government the benefit of their training and experience. In return for this benefit conferred upon the government, the veteran was to receive a preference over non-veterans for federal civil service jobs. In addition, the

veteran was entitled to apply his armed service time to his federal civil service time for purposes of job retention.

In 1964, Congress passed a Dual Compensation Act, 5 U.S.C. §§3501, 3502, et seq. Congress was concerned with the "dual compensation" aspects of a retired veteran drawing retirement or retainer pay and being entitled to credit his twenty-plus years of armed service time to his federal civil service job for retention purposes. Congress therefore defined a "retired veteran" as a member of a uniformed service entitled to retirement or retainer pay, and removed from this class the preference, eligibility, and credit for military service it had conferred under the Veterans' Preference Act of 1944. The operation of the Dual Compensation Act restricted the credit which such a veteran would enjoy in terms of tenure of employment in federal civil service for reductions in force, eligibility and the extent of retirement benefits, the extent of annual leave, and the basis and extent of workmens' compensation benefits. Since the retired veteran would be receiving retirement or retainer pay in addition to his civil service salary, it was believed that such Congressional action was necessary to place the retired veteran and the non-veteran on a more equal footing upon entering federal civil service employment.

Petitioners retired from the armed services and entered federal civil service employment subsequent to the enactment of the Dual Compensation Act. As a result of the 1964 repeal of petitioners' preference and retention rights, petitioners were either separated or reduced in grade as a result of the scheduled reduction in work force effected Janaury 15, 1970, at the North Island Facility.

Petitioners filed a complaint in the Southern District of California, under federal question jurisdiction, naming as defendants the Secretary of State and several federal officials of the civil service and navy departments. Judge Edward J. Schwartz denied petitioners' prayer for injunctive relief and dismissed the complaint for failure to state a claim.

Petitioners appealed to the Court of Appeals for the Ninth Circuit, claiming vested rights under the Veterans' Preference Act and alleging that the Dual Compensation Act was unconstitutional in its effect upon petitioners' priority rights to retain their federal civil service jobs. Petitioners case was joined for consideration by the Court with *Monaco v. United States*, see Appendix D, a case from the United States District Court for the Northern District of California, because in the

Court's opinion they presented an identical controlling question of law.

The Ninth Circuit, with Judge Bruce R. Thompson presiding, affirmed the District Courts' holdings on the basis that the constitutional issues presented were insubstantial. The Court of Appeals ruled that petitioners possessed no vested rights under the Veterans' Preference Act, but held merely an "expectancy" of an interest or a privilege that would become vested upon entrance into the federal civil service and completion of its probationary period. The Court rejected petitioners' claims by relying upon this "right" versus "privilege" distinction and cited the United States Supreme Court's ruling in *United States v. Teller*, 107 U.S. 64 (1882), *Lynch v. United States*, 292 U.S. 559 (1934), and *Flemming v. Nestor*, 363 U.S. 602 (1960), as authority for its ruling.

The Ninth Circuit also rejected petitioners' claims that the Dual Compensation Act was unconstitutional because of its arbitrary descrimination against retired veterans, and its effect as an ex post facto law and a bill of attainder, citing *Flemming v. Nestor, supra*, as a "complete and controlling answer to each of these contentions."

REASONS FOR GRANTING THE WRIT

1. The decision below raises a significant and recurring question of what types of interests are considered property and require the safeguards of due process.

It has been said that the concept of "property" in today's society takes many forms other than the traditional one of lands and chattel. *Arnett v. Kennedy*, 416 U.S. 134, 207 (1974) (Marshal, J. dissenting). *See also* Reich, The New Property 73 Yale L.J. 733,(1964). This shift in emphasis has been highlighted by judicial recognition of "new" property rights, or statutory entitlements, that demand the safeguards of due process. *Goldberg v. Kelly*, 397 U.S. 254 (welfare benefits); *Bell v. Burson*, 402 U.S. 535 (driver's license); *Board of Regents v. Roth*, 408 U.S. 564 (tenure in a state educational institution); *Perry v. Sindermann*, 407 U.S. 593 (implied tenure); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (weekly wages subject to garnishment); *Morrissey v. Brewer*, 408 U.S. 471 (parole); *Tindall v. Hardin*, 337 F. Supp. 563 (food stamps).

The Ninth Circuit's opinion on petitioners' case reflects a contradictory position in this judicial trend recognizing what is a property interest. Petitioners claim a protected property

right stemming from a benefit received under the Veterans' Preference Act of 1944. This benefit would have allowed petitioners to receive credit fro their uniformed service time for purposes of retention credit in the civil service. The Ninth Circuit chose to deal with petitioners' claims in terms of "gratuities" and "privileges." While a right versus privilege analysis has been traditionally used in the past, the modern judicial trend has rejected this approach. "The Court (has) recognized that the "wooden distinction" between "rights" and "privileges" was not determinative of the applicability of procedural due process and that a property interest may be created by statute as well as by contract." *Arnett v. Kennedy*, 416 U.S. 134, 165 (1974). *See also*, 81 Harv. L. Rev. 1439; 8 Calif. West L. Rev. 189, 220.

As noted by the preceding cases, governmental benefits have increasingly become recognized as "statutory entitlements." These are the "new property" that are entitled to all the safeguards of due process under the Fifth and Fourteenth Amendments. There have been differing opinions as to what constitutes a statutory entitlement for purposes of property under the Due Process Clause. *See Arnett v. Kennedy, supra.* One judge has

defined a statutory entitlement as a governmentally conferred benefit that is rooted in a legal obligation and is conferred upon those beneficiaries to whom Congress intended to extend some kind of enforceable interest to. *Geneva Towers Tenants Org. v. Federated Mortgage*, 504 F.2d 483, 494-496 (Hufstedler, J. dissenting).

Applying the above formula to petitioners' case, it would seem that all elements are met. The credit for time served in a uniformed service for retention purposes in federal civil service comes right out of the Congressional legislation. 5 U.S.C. §861 et seq. The Ninth Circuit opinion did not recognize the presence of any legal obligation on the government's part. The case of *Carini v. United States*, see Appendix F, is squarely on point. In that case, benefits flowing out of Congressional legislation, although not expressly mentioned, were considered incorporated into the servicemens' enlistment or re-enlistment contracts. These benefits were accordingly considered to be statutory entitlements that were vested at the time the contracts were signed. Petitioners' benefits could be considered in the same light. Finally, petitioners are among the class of beneficiaries that Congress intended to extend an enforceable interest to: that of veterans of a uniformed service.

These points were not recognized by the Ninth Circuit in their opinion, thereby leaving these questions open in petitioners case:

1. Are veterans' preference benefits statutory entitlements within the judicial interpretation of that term for purposes of due process protection of property?

2. Were the benefits as statutory entitlements incorporated into petitioners' governmental contracts so as to be vested at the time of the making of those contracts?

3. Petitioners clearly presented a substantial consitutional question regarding the validity of the Dual Compensation Act of 1964 in light of what the Due Process Clause means today.

The Ninth Circuit placed major emphasis on *Flemming v. Nestor*, 363 U.S. 602 in its determination that petitioner's case lacked a substantial constitutional question. The opinion noted that when the Supreme Court splits 5-4, as in *Flemming*, it is arguable that the constitutional issues raised cannot be termed "frivolous or wholly insubstantial." However, the Ninth Circuit dismissed the minority in *Flemming* by stating that the dissenting opinions did not agree with the "enunciation of principles to the facts of the particular case." A careful reading

of the dissents will reveal that this is not the case. The majority in *Flemming* has held that the Due Process Clause provided a very strict standard to be applied in these cases: "We must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." 363 U.S. at 613. The dissenting opinions noted specifically that the due process standard should not be so rigid, and should not be so wholly dependent upon "this court's idea of what is 'arbitrary' and 'rational.'" Id. at 626. Justice Black further warned of the future impact of the adoption of such an inflexible test: "And this elastic formula gives the Court a further power, that of holding legislative Acts constitutional on the ground that they are neither arbitrary nor irrational, even though the Acts violate specific Bill of Rights safeguards." Id. at 626. The dissenting opinions also were firmly of the opinion that the legislative action in *Flemming* was an ex post facto law and a bill of attainder.

After reviewing the dissenting opinions in *Flemming* it is petitioners' contention that the Ninth Circuit was in error in holding that petitioners' case presented no substantial issues.

It has been written that "due process is that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9, 16 (Frankfurter, J. dissenting). The Court's holding in *Flemming* was a clear departure from their traditional role in the upholding of concepts such as "fairness" and "justice." The dissenting opinions, as noted above, show the conflict that at least four Justices felt the majority's holding had with traditional principles. See Reich, The New Property, 73 Yale L.J. 733, 768-771, 775: Leahy, "Liberty" and "Justice" in Supreme Court Adjudication, 8 Calif. West L. Rev. 189, 230; Comment, 84 Harv. L. Rev. 1, 103-104.

While the *Flemming* due process test is still alive, *see United States v. Nat'l Bank*, 329 F. Supp. 1251, it is not held with unanimous favor. A new approach to a "rational basis" test has been to look to "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state (or federal) interests in support of the classification." *Dandridge v. Williams*, 397 U.S. 471, 521 (Marshall, J. dissenting). See also *Belcher v. Richardson*, 404 U.S.

78, 88 (Marshall, J. dissenting); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (Frankfurter, J. concurring).

An application of the Flemming due process test to petitioners' case would cause irreparable harm to both petitioners and the class that they represent: retired veterans of the armed services. Petitioners spent their most financially productive years serving their country, and are at an age where most prospective employers are reluctant to hire them. An application of a less strict due process test, such as the one proposed in the *Dandridge* case, would protect the vested rights and interests that petitioners earned through the service to their country.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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By: FREDERICK HETTER

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APPENDICES

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CAMP, JOE B. THORNTON, GABRIEL MICK, PAUL A. WALKER, HENRY CHAMP, ALLEN J. THOMPSON, HARRY M. JONES, KENNETH M. PERRY, WILFRED I. STACEY, MELVIN E. PITTS,

Plaintiffs,

vs.

MELVIN R. LAIRD, Secretary of Defense, Washington, D.C.

ROBERT E. HAMPTON, Chairman U.S. Civil Service Commission Washington, D.C.

JAMES E. JOHNSON, Vice Chairman, U.S. Civil Service Commission Washington, D.C.

L. J. ANDOLSEK, Commissioner, U.S. Civil Service Commission Washington, D.C.

JOHN H. CHAFFEE, Secretary of the Navy, Washington, D.C.

ADM. THOMAS H. MOORER, Chief of Naval Operations, Washington, D.C.

V. ADM. CHARLES K. DUNCAN, Chief of Naval Personnel and Deputy Chief of Naval Operations (Manpower and Naval Reserve), Arlington, Virginia

NO. 70-1-S

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

JAMES D. HITTLE, Asst. Secretary of the Navy (Manpower and Reserve Affairs), Washington, D. C.

V. ADM. ALLEN M. SHINN, Commanding Officer, Naval Airforce Pacific Fleet, North Island, San Diego, California

R. ADM. MARSHALL E. DORNIN, Commanding Officer, Eleventh Naval District, San Diego, California

CAPT. WILLIAM H. SHOCKEY, Commanding Officer, Naval Air Rework Facility, North Island, San Diego, California

ROBERT E. EATON, Employment Superintendent, Naval Air Rework Facility, North Island, San Diego, California

ASA T. BRILEY, Director of the Regional Office, U.S. Civil Service Commission, San Francisco, California

DOES I through L.

Defendants.

I

This Court has original jurisdiction of this action based upon Title 28, United States Code, Section 1331 and Title 28, United States Code, Section 1346.

II

Plaintiffs are citizens of the United States of America and of the State of California and are residents of the Southern District of California. The plaintiffs are retired military servicemen who will be adversely and discriminatorily affected by the provisions of the Dual Compensation Act, Pub. Law 88-448, 78 Stat. 484, 5 United States Code 3501, 3502, 6303, by either being separated or reduced in grade in the scheduled reduction in force at the Naval Air Rework Facility, North Island, San Diego, Calif., on January 15, 1970. Plaintiffs are bringing this action for themselves and as representatives of a class of persons similarly situated, which class is too numerous to name individually, but all members of which are similarly affected. There are

questions of law and fact common to the class, and the claims of the representative parties will fairly and adequately protect the interests of the class.

III

The defendants each are citizens of the United States and are sued in their respective capacities as hereinafter set forth.

A. The defendant Melvin R. Laird is sued in his capacity as Secretary of Defense, and is charged with the responsibility of directing all the military services and attached civilian personnel.

B. The defendants Robert E. Hampton, James E. Johnson and L.J. Andolsek are sued in their capacities as Commissioners of the United States Civil Service Commission, and are charged with performing duties as the chief executive and administrative officers of the Civil Service Commission.

C. The defendant John H. Chaffee is sued in his capacity as Secretary of the Navy, who is responsible for the policies, organization and administration of the Navy.

D. The defendant Adm. Thomas H. Moorer is sued in his capacity as Chief of Naval Operations charged with direct operation of the Navy under the Secretary of the Navy.

E. The defendant V. Adm. Charles K. Duncan is sued in his capacity as the Chief of Naval Personnel and Deputy Chief of Reserve), who is responsible for planning, programming and controlling Naval personnel.

F. The defendant James D. Hittle in his capacity as Asst. Secretary of the Navy (Manpower and Reserve Affairs), who is responsible for manpower affairs of the Navy including policy and administration of military and civilian personnel.

G. The defendant V. Adm. Allen M. Shinn in his capacity as the Commanding Officer, Naval Airforce Pacific Fleet, North Island, San Diego, California, who has command over the Naval Air

Rework Facility.

H. The defendant R. Adm. Marshall E. Dornin is sued in his capacity as the Commanding Officer of the Eleventh Naval District, who has command responsibility for the Naval Air Rework Facility.

I. The defendant Capt. William H. Shockey is sued in his capacity as Commanding Officer of the Naval Air Rework Facility, who is directly responsible for civilian employees at the Facility.

J. The defendant Robert E. Eaton is sued in his capacity as the Employment Superintendent, Naval Air Rework Facility who is the direct supervisor of civilian personnel at the Facility.

K. The defendant Asa T. Briley is sued in his capacity as the Director of the Regional Office of the United States Civil Service Commission, who is responsible for local implementation of Commission policy.

IV

The true names or capacities, whether individual, corporate, associate or otherwise of defendants named herein as DOES ONE through FIFTY are unknown to plaintiffs, who therefore sue said defendants by such fictitious names, and plaintiffs will amend this complaint to show their true names and capacities when the same have been ascertained; plaintiffs are informed and believe and thereon allege that each of the defendants designated herein as DOE is responsible in some manner for the events and happenings herein referred to in this complaint and caused damages to plaintiffs as herein alleged.

V

Plaintiffs will further amend this complaint to include additional plaintiffs, who may be deemed necessary for the hearing of this complaint.

VI

All of the plaintiffs herein are veterans of the

United States Armed Forces who have served twenty or more years and were resultingly honorably discharged from their respective branches of the military service. Each sacrificed many personal private opportunities for other professional and nonprofessional means of livelihood and also accepted many restrictions on their personal and family life adhering to the regimented standards and regulations of military life to serve their country, thereby earning military retirement pay.

VII

Plaintiffs were required by military regulations to adhere to the dictates of their command both in times of war and peace. Aside from loyalty to the United States, one of the great incentives recognized both by the United States government and individuals in the military was the retirement therefrom and its attendant relative benefits and its vested rights.

VIII

Although treated as retired military under Civil Service, plaintiffs technically receive retainer pay from the military service and are subject to recall. Also, under the present Civil Service rules and regulations, plaintiffs can never receive veteran status, nor can they ever, in fact, receive retirement pay from Civil Service.

IX

Under the provisions of Title 5, United States Code Sections 2108 (3), 3309 and Section 337.101 of the Federal Personnel Manual, the plaintiffs were given preference eligibility for the purpose of hiring in to a Civil Service position. These provisions are undoubtedly a means for the Government to obtain the same functions but in a Civil Service rather than a military capacity. However, aside from this initial inducement, the plaintiffs receive no other consideration for their years spent in the military.

X

Under the Dual Compensation Act, as incorporated into United States Code 3501 and 3502, the scheduled reduction in force on January 15, 1970 will discriminatorily cause the plaintiffs to be separated or reduced in grade. For retention purposes, the Act allows plaintiffs no credit for their military service, except for war-time service, however, an employee with under twenty years of military service is allowed full credit for the entire period of service. Although the employee with under twenty years of service may have been hired at the same time as a plaintiff, he will be retained but a plaintiff will be separated or reduced in grade. Also, an employee with no military service, but who was hired several years before plaintiffs, would be retained over plaintiffs, even though plaintiffs have had up to twenty years of experience performing the same job but in a military capacity.

XI

Besides reductions in force, plaintiffs are treated in a discriminatory manner in other areas of civil service. Section 203 of the Dual Compensation Act, as incorporated into 5 United States Code 6303, does not allow a military retiree to receive credit for his military service for annual and sick leave purposes. 5 United States Code 8116 requires a retired veteran to waive his retirement pay if he is to receive workmen's compensation from a civil service job. For retirement from Civil Service, military retirees are not allowed credit for their military service under 5 United States Code 8332. Finally, plaintiffs who are now being separated have been informed that they will receive no severance pay, contrary to the provisions of 5 United States Code 5595.

XII

The provisions of Section 202 of the Dual Compensation

Act, as incorporated into 5 United States Code 3501, 3502 and the other above cited Sections of Title 5 of the United States Code are unconstitutionally discriminatory against plaintiffs by eliminating all priorities or credit for career, retired servicemen whose rights were vested by other acts of Congress, creating such retirement rights. To eliminate such rights is to abrogate the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

XIII

Plaintiffs, due to the proposed enforcement of Section 202 of the Dual Compensation Act, 5 United States Code 3501, 3502, will suffer great hardship in that they will either lose their means of livelihood or suffer a reduction in pay in a narrow field of employment in which they will be unable to continue to pursue a career. According to private business standards, many of the plaintiffs have expended their most productive years and hence will be drastically injured due to the enforced liability of a past retirement from the United States Armed Forces.

XIV

Plaintiffs herein reallege paragraphs I through XIII above, and further state that although they were given an inducement of a five point preference for hiring purposes, their rights as retired veterans under Civil Service were misrepresented. Some of the plaintiffs were not informed, and even those plaintiffs with actual notice did not fully understand that they would receive no credit for their military service, except for war-time service, for the purposes of retention, annual and sick leave, civil service retirement, that they were required to waive their retired pay in order to receive workmen's compensation, and that they would receive no severance pay at a reduction in force.

XV

The scheduled reduction in force will cause the plaintiffs immediate, irreparable injury. Damages at law for the reduction in force would be inadequate since they are prospective and cannot be computed. There is no state remedy available to plaintiffs, and a multiplicity of suits would be necessary to obtain an adequate remedy.

XVI

Administrative remedies would be ineffective due to the urgency involved; only a temporary restraining order will stop the scheduled reduction in force on January 15, 1970. Even if there were sufficient time, administrative relief would be inadequate, since the reduction in force follows statutory procedures, and administrative relief could only be given for discriminatory treatment in the reduction in force, but would not be available for an attack on the underlying statute or rule governing the reduction in force.

WHEREFORE, plaintiffs pray:

1. That a three-judge court be convened to here this action pursuant to Title 28, U.S. Code, Sections 2282 and 2284.

2. That the court take jurisdiction of this controversy and hear and determine as promptly as possible this action and declare the rights of the plaintiffs pursuant to Title 28, U.S. Code, Sections 2201 and 2202 to be as follows:

(a) That Section 202 of the Dual Compensation Act, Pub. Law 88-448, 78 Stat. 484, 5 U.S. Code 3501, 3502, and rules adopted thereunder, be found, determined and declared illegal, contrary to law and null and void as being violative of the United States Constitution, Amendments V and XIV.

(b) That Title 5, U.S. Code, Section 6303, 8116, 8332 and rules adopted thereunder, be found,

determined and declared illegal, contrary to law and null and void as being violative of the United States Constitution, Amendments V and XIV.

3. That upon hearing of this action, the court grant to plaintiffs the following further relief:

(a) That a temporary restraining order be issued prohibiting defendants from enforcing in any manner Section 202 of the Dual Compensation Act, 5 U.S. Code 3501 and 3502 and the rules adopted thereunder.

(b) That a preliminary and permanent injunction be issued enjoining defendants from hereinafter in any manner enforcing the provisions of 5 U.S. Code 3501, 3502, 6303, 8116 and 8332.

(c) That defendants move forthwith to adopt a plan for reduction in force, sick and annual leave, workmen's compensation, and retirement, which will insure that retired veterans will not be discriminated against and which will provide a fair adjustment for time spent in the military service.

(d) That defendants and their agents be enjoined from advertising for enlistment and re-enlistment in the military service and for employment in Civil Service, unless all the negative factors of twenty years of duty be made known to a prospective career serviceman.

4. Plaintiffs also pray that they be awarded all actual damages resulting from misrepresentations of the defendants, their agents and employees which have accrued up to and including the time when the Court may hear this matter.

5. Plaintiffs further pray for such other and further

alternative relief as the nature of this action may require and the Court may deem proper.

DATED: January 2, 1970

HETTER and GLICK
Attorneys for Plaintiffs

By _____
Frederick L. Hetter

Public Law 88-448

AN ACT

To simplify, modernize, and consolidate the laws relating to the employment of civilians in more than one position and the laws concerning the civilian employment of retired members of the uniformed services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Dual Compensation Act".

TITLE I—DEFINITIONS

SEC. 101. For the purposes of this Act and the amendments made by this Act—

(1) "uniformed services", "armed forces", "Secretary concerned", "officer", "warrant officer", "grade", "active duty", "active service", and "member" have the definitions given them by section 101 of title 37, United States Code;

(2) "a retired member of any of the uniformed services" means a member or former member of any of the uniformed services who is entitled, under any provision of law, to retired, retirement, or retainer pay on account of his service as such a member;

(3) "civilian office" means a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including each corporation owned or controlled by such Government and including non-appropriated fund instrumentalities under the jurisdiction of the armed forces) or in the municipal government of the District of Columbia.

TITLE II—EMPLOYMENT OF RETIRED MEMBERS OF UNIFORMED SERVICES

SEC. 201. (a) Except as provided by subsections (b), (c), and (e) of this section, a retired officer of any regular component of the uniformed services shall receive the full salary of any civilian office which he holds, but during a period for which he receives salary, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of such pay plus one-half of the remainder, if any. In the operation of the formula for reduction of such pay under this subsection, such amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in such pay effected pursuant to the provisions of section 1401a(b) of title 10, United States Code, to reflect changes in the Consumer Price Index.

(b) The reduction in retired or retirement pay required by subsection (a) of this section shall not apply to a retired officer of any regular component of the uniformed services whose retirement was based on disability (1) resulting from injury or disease received in line of duty as a direct result of armed conflict or (2) caused by an instrumentality of war and incurred in line of duty during a period of war (as defined in sections 101 and 301 of title 38, United States Code).

(c) The reduction in retired or retirement pay required by subsection (a) of this section shall not apply to a retired officer of any regular component of the uniformed services employed on a temporary (full-time or part-time) basis, any other part-time basis, or any inter-

mittent basis, for the first thirty-day period for which he receives salary. The exemption from reduction in retired or retirement pay provided by this subsection shall not apply to a period longer than—

(1) the first thirty-day period for which he receives salary under any one appointment from the civilian office in which he is employed, if he is serving under not more than one appointment, and

(2) the first period for which he receives salary under more than one appointment, in any fiscal year, which consists in the aggregate of thirty days, from all civilian offices in which he is employed, if he is serving under more than one appointment in such fiscal year.

(d) For the purposes of subsections (a) and (c) of this section, "period for which he receives salary" means the full calendar period for which he receives salary when employed on a full-time basis but only the days for which he actually receives salary when employed on a part-time or intermittent basis.

(e) Except as otherwise provided in this subsection, the United States Civil Service Commission, subject to the supervision and control of the President, is authorized to prescribe and issue regulations under which exceptions may be made to the restrictions in subsection (a) of this section whenever it is determined by appropriate authority that such exceptions are warranted on the basis of special or emergency employment needs which otherwise cannot be readily met. The President of the Senate with respect to the United States Senate, the Speaker of the House of Representatives with respect to the United States House of Representatives, and the Architect of the Capitol with respect to the Office of the Architect of the Capitol each is authorized to provide for a means by which exceptions may be made to the restrictions in subsection (a) of this section whenever he determines that such exceptions are warranted on the basis of special or emergency employment needs which otherwise cannot be readily met. The Administrator of the National Aeronautics and Space Administration is authorized to except, at any time, any individual in a scientific, engineering, or administrative position appointed pursuant to clause (A) of section 203(b)(2) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(b)(2)(A)), from the restrictions in subsection (a) of this section, whenever the Administrator determines that such exception is warranted on the basis of special or emergency employment needs which otherwise cannot be readily met; but not more than thirty such exceptions may exist at any one time under such authority.

(f) Notwithstanding subsection (a) of this section, a retired officer of any regular component of the uniformed services who was employed in a civilian office on the day immediately preceding the effective date of this subsection—

(1) if, on such immediately preceding day, he was exempt from limitations on compensation, may elect (A) to remain subject to and continue under such exemption or (B) to be subject to applicable limitations and exemptions of subsections (a), (b), (c), and (e) of this section; or

(2) if, on such immediately preceding day, he was subject to limitations on compensation, may elect (A) to remain subject to and continue under such limitations, or (B) to be subject to applicable limitations and exemptions of subsections (a), (b), (c), and (e) of this section.

Such election is irrevocable and shall be filed with the department concerned not later than the ninetieth day after the effective date of this subsection. Any such retired officer who does not file such election within the prescribed period shall be held and considered to have elected to remain in the status which he occupies, on such immediately preceding day, with respect to limitations on compensation, or exemptions therefrom, as the case may be. In the event of any appointment, reinstatement, or reemployment of such retired officer which is made after such effective date and follows a break in service of more than thirty days, such retired officer shall be subject to applicable limitations and exemptions of subsections (a), (b), (c), and (e) of this section.

(g) A member of any of the uniformed services, serving in the Army or Air Force of the United States without component, under an appointment made under section 515 of the Officer Personnel Act of 1947, in a temporary grade higher than, or the same as, the reserve commission he then held, who, prior to the effective date prescribed by section 403 (a) of this Act, was retired for physical disability in such temporary grade, shall not be considered as subject to the restriction on the concurrent receipt of civilian compensation and retired pay contained in section 212 of the Act of June 30, 1932, as amended (5 U.S.C. 59a), for any period following such retirement.

(h) A nonregular member of any of the armed forces, who served on active duty in a temporary warrant officer grade and who was retired in that status prior to the effective date prescribed by section 403(a) of this Act, shall not be considered as subject to the restriction in section 2 of the Act of July 31, 1894, as amended (5 U.S.C. 62), for any period following such retirement.

SEC. 202. Section 12 of the Veterans' Preference Act of 1944, as amended (5 U.S.C. 861), is amended—

(1) by inserting "(a)" immediately following "SEC. 12.";

(2) by inserting ", subject to subsection (c) of this section," immediately after the word "That" in the first proviso thereof;

(3) by inserting "(subject to subsection (b) of this section)" immediately after "military preference"; and

(4) by adding at the end thereof the following new subsections:

"(b) Notwithstanding any other provision of this Act, an employee who is a retired member of any of the uniformed services included under section 2 of this Act shall be considered a preference employee for the purposes of subsection (a) of this section only if—

"(1) his retirement was based on disability (A) resulting from injury or disease received in line of duty as a direct result of armed conflict or (B) caused by an instrumentality of war and incurred in the line of duty during a period of war (as defined in sections 101 and 301 of title 38, United States Code); or

"(2) his service does not include twenty or more years of full-time active service (regardless of when performed but not including periods of active duty for training); or

"(3) immediately prior to the effective date of this subsection, he was employed in a civilian office to which this Act applies and, on and after such date, he continues to be employed in any such office without a break in service of more than thirty days.

"(c) In computing length of total service, an employee who is a retired member of any of the uniformed services shall be given credit for—

"(1) the length of time in active service in the armed forces during any war, or in any campaign or expedition (for which a campaign badge has been authorized); or

"(2) if he is included under clause (1), (2), or (3) of subsection (b) of this section, the total length of time in active service in the armed forces."

SEC. 203. The last two sentences of section 203(a) of the Annual and Sick Leave Act of 1951 (5 U.S.C. 2062(a)) are amended to read as follows: "Except as otherwise provided in this subsection, in determining years of service for the purposes of this subsection, there shall be included all service creditable under the provisions of section 3 of the Civil Service Retirement Act for the purposes of an annuity under such Act and the determination of the period of service rendered may be made upon the basis of an affidavit of the employee. Active military service of a retired member of any of the uniformed services is not creditable in determining years of service for the purpose of this subsection unless—

"(1) his retirement was based on disability (A) resulting from injury or disease received in line of duty as a direct result of armed conflict or (B) caused by an instrumentality of war and incurred in the line of duty during a period of war (as defined in sections 101 and 301 of title 38, United States Code); or

"(2) immediately prior to the effective date of this sentence, he was employed in a civilian office to which this Act applies and, on and after such date, he continued to be employed in any such office without a break in service of more than thirty days; or

"(3) such service was performed in the armed forces during any war, or in any campaign or expedition (for which a campaign badge has been authorized).

In the case of an officer or employee who is not paid on the basis of biweekly pay periods, the leave provided by this title shall accrue on the same basis as it would accrue if such officer or employee were paid on the basis of biweekly pay periods.".

SEC. 204. (a) A retired member of any of the armed forces may be appointed to serve in a civilian office in or under the Department of Defense during the period of one hundred and eighty days immediately following his retirement only if—

(1) the proposed appointment is authorized by the Secretary concerned (or his designee for the purpose), and, if such civilian office is in the competitive civil service, after approval by the United States Civil Service Commission; or

(2) the minimum rates of basic compensation for such civilian office have been increased under authority of section 504 of the Federal Salary Reform Act of 1962 (5 U.S.C. 1173); or

(3) a state of national emergency exists.

(b) A request by appropriate authority for the authorization, or the authorization and approval, as the case may be, required by subsection (a)(1) of this section shall be accompanied by a statement which shows the actions taken to assure that—

(1) full consideration, in accordance with placement and promotion procedures of the department concerned, was given to eligible career employees; and

(2) when selection is by other than certification from an established civil service register, the vacancy has been publicized to give all interested candidates an opportunity to apply; and

(3) qualification requirements for the position have not been written in a manner designed to give advantage to such retired member; and

(4) the position has not been held open pending the retirement of such retired member.

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SEC. 205. The President shall transmit to the Congress on or before January 1, 1966, a comprehensive report of the operations under this title of the departments and agencies in the executive branch.

TITLE III—LIMITATION ON DUAL COMPENSATION FROM MORE THAN ONE CIVILIAN OFFICE

SEC. 301. (a) Except as provided by subsections (b), (c), (d), and (e) of this section, civilian personnel shall not be entitled to receive basic compensation from more than one civilian office for more than an aggregate of forty hours of work in any one calendar week (Sunday through Saturday).

(b) Except as otherwise provided by subsection (c) of this section, the United States Civil Service Commission, subject to the supervision and control of the President, is authorized to prescribe and issue regulations under which exceptions may be made to the restrictions in subsection (a) of this section whenever it is determined by appropriate authority that such exceptions are warranted on the ground that personal services otherwise cannot be readily obtained.

(c) Unless otherwise authorized by law, no money appropriated by any Act shall be available for payment to any person of salary from more than one civilian office if the aggregate amount of the basic compensation from such offices exceeds the sum of $2,000 per annum, and if (1) one of such salaries is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives or (2) one of such offices is under the Office of the Architect of the Capitol.

(d) Subsection (a) of this section does not apply to—

(1) compensation on a when-actually-employed basis received from more than one consultant or expert position if such compensation is not received for the same hours of the same day;

(2) compensation consisting of fees paid on other than a time basis;

(3) compensation received by teachers of the public schools of the District of Columbia for employment in a civilian office during the summer vacation period;

(4) compensation paid by the Tennessee Valley Authority to employees performing part-time or intermittent work in addition to their normal duties when the Authority deems it to be in the interest of efficiency and economy;

(5) compensation received by any person holding an office or position the compensation for which is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives or any office or position under the Architect of the Capitol;

(6) compensation paid by the United States Coast Guard to employees occupying part-time positions of lamplighters; and

(7) compensation within the purview of any of the following provisions of law:

(A) section 9 of the Act of October 6, 1917 (40 Stat. 384; D.C. Code, sec. 31-631), relating to teachers in the public schools of the District of Columbia who also are employed in night schools and vacation schools;

(B) section 6 of the Act of March 3, 1925 (43 Stat. 1108), as amended by the Act of January 27, 1926 (44 Stat. 2),

relating to employees of the Library of Congress (2 U.S.C. 162; 5 U.S.C. 60);

(C) the Act of July 1, 1942 (56 Stat. 467; D.C. Code, sec. 31–631a), relating to custodial employees of the Board of Education of the District of Columbia;

(D) section 2 of the Act of July 22, 1947, as amended (61 Stat. 400, 74 Stat. 11; 33 U.S.C. 873), relating to extra compensation paid in connection with instrument observation or recording, the observation of tides or currents, or the tending of seismographs or magnetographs;

(E) section 3 of the Act of June 2, 1948, as amended (62 Stat. 286, 74 Stat. 11; 15 U.S.C. 327), relating to extra compensation paid in connection with the taking and transmitting of meteorological observations;

(F) section 10(b) of the Defense Department Overseas Teachers Pay and Personnel Practices Act (73 Stat. 217; 5 U.S.C. 2358(b)), relating to the compensation of certain teachers employed in another position in recess periods;

(G) section 102 of chapter 7 of title 2, Canal Zone Code (76A Stat. 15), relating to teachers in the public schools of the Canal Zone who also are employed in night schools or in vacation schools or programs;

(H) section 23(b) of title 13, United States Code, relating to the payment of compensation to employees for the field work of the Bureau of the Census, Department of Commerce; or

(I) subsection (a) or (c) of section 3335 of title 39, United States Code, relating to dual employment and extra duties in the postal field service.

(e) With respect to the compensation of persons serving on the effective date of this section in more than one position under properly authorized appointments, subsection (a) of this section shall not apply for the duration of the appointment or appointments concerned.

(f) This title shall not be applicable to persons employed under the joint resolution approved July 6, 1961 (75 Stat. 199; Public Law 87–82), or under section 208 of the First Supplemental Civil Functions Appropriation Act, 1941 (54 Stat. 1056; Public Law 812, 76th Congress).

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. (a) Section 18 of the Act of December 20, 1944, as added by section 2 of the Act of August 19, 1950 (64 Stat. 466; D.C. Code, sec. 2–1226), is amended by inserting immediately before the period at the end thereof a comma and the following: "subject to section 201 of the Dual Compensation Act".

(b) The second paragraph of section 2 of the Act of August 11, 1950 (64 Stat. 438; D.C. Code, sec. 6–1202), is amended to read as follows:

"Notwithstanding the limitation of any law, there may be employed in such Office of Civil Defense any person who has been retired from any of the uniformed services of the United States or any office or position in the Federal or District governments, and except as hereinafter provided, while so employed in such Office of Civil Defense any such retired person may receive the compensation authorized for such employment or the retirement compensation or annuity, whichever he may elect, and upon the termination of such employment, he shall be restored to the same status as a retired officer or employee with the same retirement compensation or annuity to which he was entitled before having been employed in such Office of Civil Defense. While any person who has been retired from any of the uniformed services of the United States is so employed in such Office of Civil Defense, he may receive the compensation authorized for such employment and his retired or retirement pay, subject to section 201 of the Dual Compensation Act."

(c) Section 13(b) of the Peace Corps Act (75 Stat. 619; 22 U.S.C. 2512(b)) is amended—

(1) by striking out "section 212 of the Act of June 30, 1932, as amended (5 U.S.C. 59a),"; and

(2) by inserting immediately before the period at the end thereof a comma and the following: "subject to section 201 of the Dual Compensation Act".

(d) Section 44 of the Arms Control and Disarmament Act (75 Stat. 636; 22 U.S.C. 2584) is amended—

(1) by striking out "section 212 of the Act of June 30, 1932, as amended (5 U.S.C. 59a),"; and

(2) by inserting immediately before the period at the end thereof a comma and the following: "subject to section 201 of the Dual Compensation Act".

(e) Section 626(b) of part III of the Act entitled "An Act to promote the foreign policy, security, and general welfare of the United States by assisting peoples of the world in their efforts toward economic development and internal and external security, and for other purposes", approved September 4, 1961 (75 Stat. 451; 22 U.S.C. 2386(b)), is amended—

(1) by striking out "section 212 of Public Law 72–212, as amended (5 U.S.C. 59a),"; and

(2) by inserting immediately before the period at the end thereof a comma and the following: "subject to section 201 of the Dual Compensation Act".

(f) Section 28 of the Atomic Energy Act of 1954 (68 Stat. 926; 42 U.S.C. 2038) is amended by striking out "Any such officer serving as Chairman of the Military Liaison Committee shall receive, in addition to his pay and allowances, including special and incentive pays, or in addition to his retired pay, an amount equal to the difference between such pay and allowances, including special and incentive pays, or between his retired pay, and the compensation prescribed for the Chairman of the Military Liaison Committee." and inserting in lieu thereof the following: "Any such active officer serving as Chairman of the Military Liaison Committee shall receive, in addition to his pay and allowances, including special and incentive pays, an amount equal to the difference between such pay and allowances, including special and incentive pays, and the compensation fixed for such Chairman. Any such retired officer serving as Chairman of the Military Liaison Committee shall receive the compensation fixed for such Chairman and his retired pay, subject to section 201 of the Dual Compensation Act."

(g) Section 204(d) of the National Aeronautics and Space Act of 1958 (72 Stat. 432; 42 U.S.C. 2474(d)) is amended by striking out "The compensation received by any such officer for his service as Chairman of the Liaison Committee shall be equal to the amount (if any) by which the compensation fixed by subsection (a)(1) for such Chairman exceeds his pay and allowances (including special

and incentive pays) as an active officer, or his retired pay." and inserting in lieu thereof "Any such active officer serving as Chairman of the Liaison Committee shall receive, in addition to his pay and allowances, including special and incentive pays, an amount equal to the difference between such pay and allowances, including special and incentive pays, and the compensation fixed by subsection (a)(1) for such Chairman. Any such retired officer serving as Chairman of the Liaison Committee shall receive the compensation fixed by subsection (a)(1) for such Chairman and his retired pay, subject to section 201 of the Dual Compensation Act."

(h) Section 3(b)(1) of the Act of August 28, 1958 (72 Stat. 1091; Public Law 85–850), is amended to read as follows:

"(1) One member, who shall serve as Chairman, and who shall be a resident from the area comprising the Savannah, Altamaha, Saint Marys, Apalachicola-Chattahoochee, and Perdido-Escambia River Basins (and intervening areas) embraced within the States referred to in the first section of this Act and who shall not, during the period of his service on the Commission, hold any other position as an officer or employee of the United States, except that a retired military officer or a retired Federal civilian officer or employee may be appointed under this Act without prejudice to his retired status. A retired Federal civilian officer or employee appointed under this Act shall receive compensation as authorized herein in addition to his annuity, but the sum of his annuity and such compensation as may be payable hereunder shall not exceed $12,000 in any one calendar year. A retired military officer appointed under this Act shall receive compensation as authorized herein and his retired pay, subject to section 201 of the Dual Compensation Act;".

(i) Section 9 of the Act of October 6, 1917 (40 Stat. 384; D.C. Code, sec. 31–631), is amended by striking out "That section six of the legislative, executive, and judicial appropriation Act, approved May tenth, nineteen hundred and sixteen, as amended by the naval appropriation Act, approved August twenty-ninth, nineteen hundred and sixteen," and inserting in lieu thereof "Section 301 of the Dual Compensation Act".

(j) Section 6 of the Act of March 3, 1925, as amended by the Act of January 27, 1926 (43 Stat. 1108, 44 Stat. 2; 2 U.S.C. 162, 5 U.S.C. 60), is amended by striking out "nor shall any additional compensation so paid to such employees be construed as a double salary under the provisions of section 6 of the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1917, as amended (Thirty-ninth Statutes at Large, page 582)." and inserting in lieu thereof "and section 301 of the Dual Compensation Act shall not apply to any additional compensation so paid to such employees."

(k) The Act of July 1, 1942 (56 Stat. 467; D.C. Code, sec. 31–631a), is amended by striking out "That section 6 of the Act entitled 'An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1917', approved May 10, 1916 (39th Stat. 120), and Acts amendatory thereto," and inserting in lieu thereof "That section 301 of the Dual Compensation Act".

(l) Section 2 of the Act of July 22, 1947, as amended (61 Stat. 400, 74 Stat. 11; 33 U.S.C. 873), is amended by inserting immediately before the period at the end thereof the following: "and without regard to section 301 of the Dual Compensation Act".

(m) Section 3 of the Act of June 2, 1948, as amended (62 Stat. 286, 74 Stat. 11; 15 U.S.C. 327), is amended by inserting immediately before the period at the end thereof the following: "without regard to section 301 of the Dual Compensation Act".

(n) Section 10(b) of the Defense Department Overseas Teachers Pay and Personnel Practices Act (73 Stat. 217; 5 U.S.C. 2358(b)) is amended by striking out "section 2 of the Act of July 31, 1894 (5 U.S.C. 62), relative to the holding of more than one office, section 6 of the Act of May 10, 1916 (5 U.S.C. 58 and 59), relative to double salaries, and any other law relating to the receipt of more than one salary or the holding of more than one office" and inserting in lieu thereof "section 301 of the Dual Compensation Act".

(o) Section 102 of chapter 7 of title 2, Canal Zone Code (76A Stat. 15), is amended by striking out "Section 2 of the Legislative, Executive, and Judicial Appropriation Act, approved July 31, 1894, as amended (28 Stat. 205; 5 U.S.C., sec. 62), and section 6 of the Legislative, Executive, and Judicial Appropriation Act, approved May 10, 1916, as amended (39 Stat. 120; 5 U.S.C., sec. 58), do" and inserting in lieu thereof "Section 301 of the Dual Compensation Act does".

(p) Section 23(b) of title 13, United States Code, is amended by inserting immediately before the period at the end thereof the following: "without regard to section 301 of the Dual Compensation Act".

(q) Subsections (a) and (c) of section 3335 of title 39, United States Code, each are amended by striking out "sections 58, 62, 69, and 70 of title 5" and inserting in lieu thereof "sections 69 and 70 of title 5 and section 301 of the Dual Compensation Act".

SEC. 402. (a) The following laws and parts of laws are hereby repealed:

(1) Section 1763 of the Revised Statutes (5 U.S.C. 58), relating to the receipt of compensation from more than one office.

(2) Section 2074 of the Revised Statutes (25 U.S.C. 50), prohibiting the holding of more than one office at the same time under title XXVIII of the Revised Statutes.

(3) Section 4395 of the Revised Statutes as amended by the Act of January 20, 1888 (25 Stat. 1), providing for the appointment of a Commissioner of Fish and Fisheries who shall not hold any other office.

(4) The Act of July 2, 1882 (22 Stat. 176), authorizing additional pay or compensation for Government employees engaged in cataloging Government publications at the direction of the Joint Committee on Printing.

(5) The sentence in the Act of February 25, 1885 (23 Stat. 329), which reads as follows: "And hereafter no consul or consul-general shall be entitled to or allowed any part of any salary appropriated for payment of a secretary or second secretary of legation or an interpreter."

(6) Joint Resolution Numbered 3 of February 5, 1889 (25 Stat. 1019), authorizing the President to appoint an officer of the United States Coast and Geodetic Survey as a delegate to the International Geodetic Association to serve without extra salary or additional compensation.

(7) Section 2 of the Act of July 31, 1894 (28 Stat. 205), as amended by the Act of May 31, 1924 (43 Stat. 245), by section 6 of the Act of July 30, 1937 (50 Stat. 549), and by the Act of June 25, 1938 (52 Stat. 1194), relating to the holding of two offices (5 U.S.C. 62).

(8) The paragraph in the Act of February 20, 1895 (28 Stat. 676), providing for the compensation of members of a commission established to recommend the location of a certain building, which reads as follows:

"The compensation of said commissioners shall be fixed by the Secretary of the Treasury, but the same shall not exceed six dollars per day and actual traveling expenses: *Provided, however*, That the

member of said commission appointed from the Treasury Department shall be paid only his actual traveling expenses."

(9) Section 7 of the Act of June 3, 1896 (29 Stat. 235; 5 U.S.C. 63), relating to the employment of retired officers of the Army and Navy in connection with river and harbor improvements.

(10) Section 7 of the Act of June 28, 1902 (32 Stat. 483), relating to the appointment and compensation of certain officers employed under such Act.

(11) The paragraph of the Act of March 4, 1909 (35 Stat. 931), relating to the pay of retired Army and Navy officers and enlisted men then in the employ of the Isthmian Canal Commission, which reads as follows:

"Authority is hereby granted for the payment of salaries and wages accrued or hereafter earned of retired army and navy officers and enlisted men now in the employment of the Isthmian Canal Commission, in addition to their retired pay, where their compensation under such employment does not exceed two thousand five hundred dollars per annum."

(12) The second paragraph under the center heading "THE ISTHMIAN CANAL" with the side heading "National Waterways Commission:" in the Act of August 5, 1909 (36 Stat. 130), authorizing the National Waterways Commission to pay not to exceed three officers or employees of the Government without regard to the Act of July 31, 1894, and other laws.

(13) Section 12 of the Act of August 20, 1912 (37 Stat. 319; 7 U.S.C. 165), relating to the appointment of members of a Federal Horticultural Board from among employees of the Department of Agriculture.

(14) Section 6 of the Act of May 10, 1916 (39 Stat. 120; 5 U.S.C. 58), as amended by the Act of August 29, 1916 (39 Stat. 582; 5 U.S.C. 59), relating to double salaries.

(15) Section 8 of the Act of March 21, 1918 (40 Stat. 455–456), authorizing the President to avail himself of the assistance of Government employees in the operation of transportation facilities taken over by the President.

(16) Sections 3 and 4 of the War Finance Corporation Act (40 Stat. 507; 15 U.S.C. 333, 334), authorizing the appointment of Government employees to membership on the Board of Directors of the War Finance Corporation and providing for their compensation.

(17) The last paragraph under the heading "DISTRICT OF COLUMBIA" and under the subheading "PUBLIC SCHOOLS" contained in the first section of the Act of July 8, 1918 (40 Stat. 823; D.C. Code, sec. 31–631), relating to the application of section 6 of the Act of May 10, 1916, to employees of the community center department of the public schools of the District of Columbia.

(18) The ninth paragraph under the heading "DISTRICT OF COLUMBIA" and under the subheading "PUBLIC SCHOOLS" contained in the first section of the Third Deficiency Act, fiscal year 1920 (41 Stat. 1017; D.C. Code, sec. 31–631), relating to the application of section 6 of the Act of May 10, 1916, to employees of the school garden department of the public schools of the District of Columbia.

(19) That part of the proviso contained in the paragraph under the heading "BUREAU OF THE BUDGET" in the Act of February 17, 1922 (42 Stat. 373; 5 U.S.C. 64), relating to the application of section 2 of the Act of July 31, 1894, to retired officers of the Army, Navy, Marine Corps, or Coast Guard appointed to certain offices in the Bureau of the Budget, which reads as follows: "*Provided*, That section 2 of the Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending

June 30, 1895, and for other purposes, approved July 31, 1894, shall not be construed as having application to retired officers of the Army, Navy, Marine Corps, or Coast Guard who may be appointed to the offices created by section 207 of the Budget and Accounting Act, 1921, approved June 10, 1921, within the meaning of precluding payment to such officers of the difference in pay prescribed for such offices and their retired pay;".

(20) Section 212 of the Act of June 30, 1932 (47 Stat. 406), as amended by section 3 of the Act of July 15, 1940 (54 Stat. 761), by the Act of February 20, 1954 (68 Stat. 18), by section 2 of the Act of August 4, 1955 (69 Stat. 498), by section 2201(11) of the Act of June 17, 1957 (71 Stat. 158), and by section 13(d) of the Act of September 2, 1958 (72 Stat. 1264), relating to the limitation on the amount of retired pay received for commissioned officer service when combined with Government civilian salary (5 U.S.C. 59a).

(21) The Act of September 13, 1940 (54 Stat. 885), authorizing Jesse H. Jones, Federal Loan Administrator, to exercise the duties of the Office of Secretary of Commerce.

(22) The Act of March 29, 1945 (59 Stat. 38), authorizing the Doorkeeper of the House of Representatives during the Seventy-ninth Congress to employ Government employees for folding speeches and pamphlets.

(23) The Act of August 10, 1946 (60 Stat. 978), as amended by the Act of October 29, 1951 (65 Stat. 662), providing authority for the employment of certain retired officers in the Veterans' Administration (formerly contained in 5 U.S.C. 64a), which authority has expired.

(24) The fifth sentence of section 3 of the Reconstruction Finance Corporation Act, as in effect on June 30, 1947 (47 Stat. 6), and as continued by section 3(a) of such Act, as amended (61 Stat. 203, 62 Stat. 262; 15 U.S.C. 603(a)), relating to employees of the Reconstruction Finance Corporation, which reads: "Nothing contained in this or in any other Act shall be construed to prevent the appointment and compensation as an employee of the corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof."

(25) Section 2 of the Act of July 11, 1947 (61 Stat. 311; D.C. Code, sec. 4–183), relating to the position of director of the band in the Metropolitan Police force of the District of Columbia.

(26) Section 3 of the Act of April 21, 1948, as amended (7 U.S.C. 438), relating to the Remount Service in the Department of Agriculture.

(27) That part of section 9 of the Act of June 4, 1948 (62 Stat. 342; D.C. Code, sec. 2–1709), relating to personnel of the Armory Board of the District of Columbia, which reads: ", and without regard to any prohibition against double salaries contained in any other law".

(28) Section 5(f) of the Central Intelligence Agency Act of 1949, as amended (65 Stat. 89, 72 Stat. 337; 50 U.S.C. 403f(f)), authorizing employment of not more than fifteen retired officers who must elect between civilian salary and retired pay.

(29) That part of the second sentence of section 103 of the American-Mexican Treaty Act of 1950 (64 Stat. 847), relating to the International Boundary and Water Commission, United States and Mexico, which reads: ", and who shall be entitled to receive, as compensation for such temporary service, the difference between the rates of pay established therefor and their retired pay during the period or periods of such temporary employment".

(30) That part of section 401(a) of the Federal Civil Defense Act of 1950, as amended (64 Stat. 1254; 50 U.S.C. App. 2253(a)), which reads: "and, notwithstanding the provisions of any other law,

except those imposing restrictions upon dual compensation, employ, in a civilian capacity, with the approval of the President, not to exceed twenty-five retired personnel of the armed services on a full- or part-time basis without loss or reduction of or prejudice to their retired status;".

(31) Subparagraph (g) of the third paragraph of the Act of August 5, 1953 (67 Stat. 366), as amended by the Act of August 9, 1955 (69 Stat. 590), and by the Act of August 28, 1957 (71 Stat. 457), relating to the Corregidor-Bataan Memorial Commission (36 U.S.C. 426(g)).

(32) Section 12 of the District of Columbia Teachers' Salary Act of 1955 (69 Stat. 529; D.C. Code, sec. 31–1541), authorizing employment of retired members of the armed services of the United States as teachers of military science and tactics in public high schools of the District of Columbia.

(33) Section 8 of the Act of September 7, 1957 (71 Stat. 628; 36 U.S.C. 748), relating to appointment and pay of certain retired officers by the Civil War Centennial Commission.

(34) Section 203(b)(11) of the National Aeronautics and Space Act of 1958 (72 Stat. 431; 42 U.S.C. 2473 (b)(11)), authorizing the employment of retired commissioned officers subject only to the limitations in pay set forth in section 212 of the Act of June 30, 1932, as amended (5 U.S.C. 59a).

(35) Section 626(c) of the Act of September 4, 1961 (75 Stat. 451; 22 U.S.C. 2386(c)), authorizing employment of retired officers under the Act for International Development of 1961 or the International Peace and Security Act of 1961.

(36) Section 201(d) of chapter 7 of title 2, Canal Zone Code (76A Stat. 21), relating to retired members of a regular component of the Armed Forces or the Public Health Service of the United States employed in the Canal Zone Government or the Panama Canal Company.

(37) The matter contained in section 507 of the Department of Defense Appropriation Act, 1964 (77 Stat. 264; Public Law 88–149), relating to retired military personnel on duty at the United States Soldiers' Home, which reads: ": *Provided*, That section 212 of the Act of June 30, 1932 (5 U.S.C. 59a), shall not apply to retired military personnel on duty at the United States Soldiers' Home", and provisions to the same effect contained in other appropriation Acts enacted prior to the effective date of this section relative to retired military personnel on duty at the United States Soldiers' Home (5 U.S.C. 59b).

(38) The next to the last sentence of section 4103(b) of title 38, United States Code, relating to the application of certain provisions of law to the Chief Medical Director of the Department of Medicine and Surgery of the Veterans' Administration, which reads: "Section 62 of title 5 of the United States Code shall not apply to any individual appointed Chief Medical Director before January 1, 1964; however, section 59a of title 5 shall apply, in accordance with its terms, to any such individual.".

(b) All other provisions of law, general or specific, inconsistent with this Act and the amendments made by this Act, are hereby repealed.

(c) Nothing contained in this Act shall be construed to repeal or modify the provisions of the last paragraph under the heading "Administrative Provisions" in the appropriations for the Senate contained in the Legislative Branch Appropriation Act, 1957 (70 Stat. 360; 2 U.S.C. 66a).

SEC. 403. (a) Except as provided in subsection (b) of this section, this Act shall become effective on the first day of the first month which begins later than the ninetieth day following the date of enactment of this Act.

(b) This section and sections 201(g) and 201(h) shall become effective on the date of enactment of this Act.

SEC. 404. If any provision of this Act shall be held invalid, the remainder of this Act shall not be affected thereby.

Approved August 19, 1964.

Public Law 88-449

AN ACT

To charter by Act of Congress the Pacific Tropical Botanical Garden.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CREATION OF THE CORPORATION

SECTION 1. The following persons: Henry Francis duPont, Winterthur, Delaware; Deane Waldo Malott, Ithaca, New York; Horace Marden Albright, Los Angeles, California; Robert Allerton, Kauai, Hawaii; and Paul Bigelow Sears, New Haven, Connecticut; and their successors, are hereby created and declared to be a body corporate by the name of Pacific Tropical Botanical Garden (hereinafter referred to as the "corporation") and by such name shall be known and have perpetual succession and the powers, limitations, and restriction herein contained.

COMPLETION OF ORGANIZATION

SEC. 2. The persons named in section 1 shall be the incorporators of the corporation and members of the initial board of trustees and are authorized to complete the organization of the corporation by the selection of other trustees and officers, the adoption of bylaws, not inconsistent with this Act, and the doing of such other acts necessary to carry into effect the provisions of this Act.

OBJECTS AND PURPOSES OF CORPORATION

SEC. 3. The objects and purposes of the corporation shall be—

(a) to establish, develop, operate, and maintain for the benefit of the people of the United States an educational and scientific center in the form of a tropical botanical garden or gardens, together with such facilities as libraries, herbaria, laboratories, and museums which are appropriate and necessary for encouraging and conducting research in basic and applied tropical botany;

(b) to foster and encourage fundamental research with respect to tropical plant life and to encourage research and study of the uses of tropical flora in agriculture, forestry, horticulture, medicine, and other sciences;

(c) to disseminate through publications and other media the knowledge acquired at the gardens relative to basic and applied tropical botany;

(d) to collect and cultivate tropical flora of every nature and origin and to preserve for the people of the United States species of tropical plant life threatened with extinction;

SEC. 210. No part of any appropriation for the fiscal year 1945 contained in this or any other Act shall be paid to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve of the nomination of said person.

SEC. 211. The funds appropriated in the appropriation Acts for the fiscal year 1945 of the services mentioned in the title of the Act of June 16, 1942 (Public Law 607, Seventy-seventh Congress), shall be available for, and the heads of the executive departments concerned are authorized to prescribe, per diem rates of allowance, at rates not to exceed $7 per day, in lieu of subsistence to officers traveling on official business and away from their designated posts of duty, and to members of the services concerned (including officers, warrant officers, contract surgeons, enlisted personnel, aviation cadets, and members of the Nurse Corps) when traveling by air under competent orders and on duty without troops.

SEC. 212. No part of any appropriation contained in this or any other Act shall be used to pay in excess of $2 per volume for the current and future volumes of the United States Code Annotated or in excess of $3.25 per volume for the current or future volumes of the Lifetime Federal Digest.

SEC. 213. After January 1, 1945, no part of any appropriation or fund made available by this or any other Act shall be allotted or made available to, or used to pay the expenses of, any agency or instrumentality including those established by Executive order after such agency or instrumentality has been in existence for more than one year, if the Congress has not appropriated any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it. For the purposes of this section, any agency or instrumentality including those established by Executive order shall be deemed to have been in existence during the existence of any other agency or instrumentality, established by a prior Executive order, if the principal functions of both of such agencies or instrumentalities are substantially the same or similar. When any agency or instrumentality is or has been prevented from using appropriations by reason of this section, no part of any appropriation or fund made available by this or any other Act shall be used to pay the expenses of the performance by any other agency or instrumentality of functions which are substantially the same as or similar to the principal functions of the agency or instrumentality so prevented from using appropriations, unless the Congress has specifically authorized the expenditure of funds for performing such functions.

SEC. 214. This Act may be cited as the "Independent Offices Appropriation Act, 1945".

Approved June 27, 1944.

[CHAPTER 287]

AN ACT

To give honorably discharged veterans, their widows, and the wives of disabled veterans, who themselves are not qualified, preference in employment where Federal funds are disbursed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Veterans' Preference Act of 1944".

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in

either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2 (1), (2), and (3), and five points shall be added to the earned ratings of those persons included under section 2 (4) of this Act: *Provided*, That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by a concurrent resolution of the Congress for such other positions as may from time to time be determined by the President.

SEC. 4. In examinations where experience is an element of qualification, time spent in the military or naval service of the United States shall be credited in a veteran's rating where his or her actual employment in a similar vocation to that for which he or she is examined was interrupted by such military or naval service. In all examinations to determine the qualifications of a veteran applicant, credit shall be given for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor.

SEC. 5. In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, provided any such requirement is not essential to the performance of the duties of the position for which examination is given. The Civil Service Commission or other examining agency, after giving due consideration to the recommendation of any accredited physician, shall waive the physical requirements in the case of any veteran, provided such veteran is, in the opinion of the Civil Service Commission, or other examining agency physically able to discharge efficiently the duties of the position for which the examination is given. No minimum educational requirement will be prescribed in any civil-service examination except for such scientific, technical, or

professional positions the duties of which the Civil Service Commission decides cannot be performed by a person who does not have such education. The Commission shall make a part of its public records its reasons for such decision.

SEC. 6. Preference eligibles shall not be subject to the provisions of section 9 of the Civil Service Act concerning two or more members of a family in the service, or to the provisions of section 2 of that Act concerning apportionment of appointments in the Government departments in the District of Columbia among the several States and Territories according to population, but may be required to furnish evidence of residence and domicile.

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided*, That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided*, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further*, That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing

officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

SEC. 10. The Civil Service Commission is authorized and directed to hold an examination, during the next succeeding quarterly period, for any position to which any appointment has been made within the preceding three years, for any person included under section 2 (1), (2), and (3) of this Act upon application for examination for any such position.

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replaceing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SEC. 13. Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent.

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal

appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

SEC. 16. Any preference eligible who has resigned shall, upon request to the Civil Service Commission, have his name again placed on all proper civil-service registers for which he may have been qualified, in the order as provided for in section 7 hereof, and shall then be eligible for recertification and reappointment in the order, and according to the procedure, as provided for in sections 7 and 8 hereof.

SEC. 17. The term "Civil Service Commission" or "Commission" as used in this Act shall mean the present United States Civil Service Commission or any body or person who may by law succeed to its powers and duties, or any of them, or which or who may be designated by law to perform any specific duty and possess any specific power concerning matters covered by this Act.

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof.

SEC. 20. Nothing contained in this Act is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by, or made with, the advice and consent of the United States Senate: *Provided, however*, That the provisions of this Act shall apply to appointments under Public Law Numbered 720, Seventy-fifth Congress, third session, approved June 25, 1938.

SEC. 21. If any part of this Act shall be found to be unconstitutional, the rest of it shall be considered as in full force and effect.

Approved June 27, 1944.

[CHAPTER 288]

AN ACT

To clarify the law relative to allowances for mileage of graduates of the United States Military Academy and transportation of their dependents on assignment to their first duty station and to the mileage allowance of persons entering the United States Military Academy as cadets.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That officers graduated from the United States Military Academy when traveling under competent orders to the first station to which they are permanently assigned for duty shall receive the mileage allowance authorized by law for officers of the Army traveling under competent orders without troops, for the distance actually traveled under such orders, not to exceed the distance by the shortest usually traveled route from their homes or from West Point, New York, as may be designated in their orders, to such first duty stations. The orders mentioned in the first sentence of this section shall be deemed to involve a "permanent change of station" as those words are used in the fifth paragraph of section 12, Pay Readjustment Act of 1942 (Act of June 16, 1942; 56 Stat. 365), and the rights of the officers concerned shall be governed by the provisions of that paragraph with respect to the transportation of their dependents and household effects. That portion of the Act of August 9, 1912 (37 Stat. 252; 10 U. S. C. 744), which reads as follows: "*Provided further*, That hereafter a graduate of the Military Academy shall receive mileage as authorized by law for officers of the Army from his home to the station which he first joins for duty", is hereby repealed. The provisions of this section shall be effective as of January 19, 1943: *Provided*, That no person shall suffer, by reason of the enactment of this Act, any reduction in any allowance or compensation which he has been paid or to which he was entitled immediately prior thereto.

SEC. 2. A person entering the United States Military Academy as a cadet shall receive a mileage allowance at the rate of 5 cents per mile for all travel which he actually performs, and which he certifies he has actually performed, while proceeding to the United States Military Academy for admission as a cadet, not in excess of the distance by the shortest usually traveled route between the place which he certifies was his actual permanent place of abode or home, school, or Army station at the time such travel was commenced and the United States Military Academy: *Provided*, That a person discharged from the armed forces to enter the United States Military Academy shall receive a mileage allowance at the rate of 5 cents per mile for travel performed not in excess of the distance by the shortest usually traveled route between the place of discharge as certified by him and the United States Military Academy: *Provided further*, That no travel allowance shall be payable under this section for travel performed outside the continental limits of the United States. All payments to such persons for travel to the United States Military Academy made on or after June 1, 1940, to the extent that they involve questions as to the place from which payment of mileage was authorized, are hereby approved, ratified, and confirmed.

Approved June 27, 1944.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SALVATORE F. MONACO, et al.,
Plaintiffs-Appellants,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.
No. 73-2743

JAMES H. CAMP, et al.,
Plaintiffs-Appellants,
vs.
JAMES R. SCHLESINGER,
Secretary of Defense, et al.,
Defendants-Appellees.
No. 74-3141a

OPINION

[September 17, 1975]

Appeals from the United States District Court
for the Northern District of California and
for the Southern District of California

Before: CHAMBERS and CARTER, Circuit Judges,
and THOMPSON,* District Judge

THOMPSON, District Judge:

These are companion cases which were consolidated on appeal inasmuch as each presents an identical controlling question of law.

The Monaco case was commenced in the Northern District of California by several civil service employees of the Naval Air Rework Facility at the Naval Air Station, Alameda County, California, as a class action on behalf of themselves and other

*The Honorable Bruce R. Thompson, United States District Judge, District of Nevada, sitting by designation.

employees who were in a retired or retainer status from career service in the Armed Forces of the United States. The named defendants are the United States, the Secretary of Defense and a number of other federal military and civil service officials. The action came on for hearing before the District Court on plaintiffs' motion for a preliminary injunction. On July 3, 1973, the Court denied the motion. This appeal is from the order denying the preliminary injunction and the jurisdiction of this Court is predicated on 28 U.S.C. § 1292(a)(1).

Similarly, James H. Camp and others filed a complaint in the Southern District of California naming as defendants the Secretary of Defense and several federal officials of the civil service and navy departments. The class of plaintiffs consisted of civil service employees of the Naval Air Rework Facility, North Island, San Diego, California, who were retired military servicemen. The case came before the District Court on plaintiffs' prayer for a temporary restraining order and, after hearing, Judge Edward J. Schwartz entered an order denying the relief sought and dismissing the complaint for failure to state a claim. An appeal was taken which was remanded by this Court of Appeals for reasons not pertinent to this Opinion. Thereafter, plaintiffs filed an amended complaint. The matter came on for hearing on defendants' motion to dismiss before Judge Gordon Thompson, Jr., and he, on November 10, 1972, granted the motion to dismiss for failure to state a claim. This appeal followed, the jurisdiction of this Court being founded on 28 U.S.C. § 1291.

In both the Monaco and Camp cases, the plaintiffs, retired military personnel, were threatened with loss of their civil service jobs as a consequence of a substantial reduction in force at the respective Naval Air Rework Facilities. All plaintiffs were receiving pensions earned by virtue of their military service from which they had retired. The plaintiffs assert vested rights under the Veterans Preference Act of 1944, originally codified at 5 U.S.C. § 861, et seq., which was in effect during the periods of their active military service. The plaintiffs allege that the Dual Compensation Act of 1964, 5 U.S.C. §§ 3501, 3502 and 7303, is unconstitutional and injunctive relief was sought against the enforcement of the provisions of the Dual Compensation Act of 1964 insofar as they affect the priority rights of plaintiffs to retain their civil service employment.

The Veterans Preference Act of 1944, in addition to establishing a general preference for honorably discharged veterans "[I]n certification for appointment, in appointment, and in retention in civilian positions in all establishments, agencies, bureaus, projects and departments of the Government" (58 Stat. 387, ch. 287, sec. 2), contained the following specific provision (58 Stat. 387, ch. 287, sec. 12):

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military, preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings • • •."

The Dual Compensation Act of 1964 (P.L. 88-448, 78 Stat. 484) provided, in pertinent part:

> "Sec. 202, Section 12 of the Veterans' Preference Act of 1944, as amended (5 U.S.C. 861), is amended—
>
> "(1) by inserting '(a)' immediately following 'Sec. 12.';
>
> "(2) by inserting, 'subject to subsection (c) of this section,' immediately after the word 'That' in the first proviso thereof;
>
> "(3) by inserting '(subject to subsection (b) of this section)' immediately after 'military preference'; and
>
> "(4) by adding at the end thereof the following new subsections: '(b) Notwithstanding any other provision of this Act, an employee who is a retired member of any of the uniformed services included under section 2 of this Act shall be considered a preference employee for the purposes of subsection (a) of this section only if—

"'(i) his retirement was based on disability (A) resulting from injury or disease received in line of duty as a direct result of armed conflict or (B) caused by an instrumentality of war and incurred in the line of duty during a period of war (as defined in sections 101 and 301 of title 38, United States Code); or

"'(2) his service does not include twenty or more years of full-time active service (regardless of when performed but not including periods of active duty for training); or

"'(3) immediately prior to the effective date of this subsection, he was employed in a civilian office to which this Act applies, and, on and after such date, he continues to be employed in any such office without a break in service of more than thirty days.'"

It is primarily the foregoing section of the Dual Compensation Act which is attacked as unconstitutional by these plaintiffs. The impact of the amendment was to eliminate the preference rights of these plaintiffs to retention in civil service employment because the military service of these plaintiffs did include twenty or more years of full-time active service and because these plaintiffs were not employed in a civilian office to which the Act applies immediately prior to the effective date of the subsection, that is, August 19, 1964.

In both cases, a motion was made to empanel a statutory three-judge district court under 28 U.S.C. § 2282. In each case, the motion was denied upon the ground that the constitutional issue is insubstantial. *Ex parte Poresky*, 290 U.S. 30 (1933). We agree. We, nevertheless, recognize the test for insubstantiality explicated by the Supreme Court in *Goosby v. Osser*, 409 U.S. 512, 518 (1973):

> "Title 28 U.S.C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' Bailey v. Patterson, 369 U.S., at 33; 'wholly insubstantial,' ibid.; 'obviously frivolous,' Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); and 'obviously without merit,' Ex parte Poresky, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if '"its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."' Ex parte Poresky, supra, at 32, quoting from Hannis Distilling Co. v. Baltimore, supra, at 288; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-106 (1933); McGilvra v. Ross, 215 U.S. 70, 80 (1909)."

See *Cannon v. Breed*, ... F. 2d ..... (9th Cir., June 19, 1975).

We observe the facial incongruity of declaring a contention to be "essentially fictitious," "wholly insubstantial" and "obviously without merit" in the light of the arguments sincerely made by Appellants in lengthy briefs. It would be equally incongruous for this Court to engage in a lengthy discussion of the contentions in the light of a conclusion that the constitutional issues are insubstantial. We shall, therefore, limit ourselves to a short, succinct statement of the reasons for this conclusion.

The hub of Appellants' argument is that they, by enlisting in the military service between 1944 and 1964, acquired a vested, unrepealable right by virtue of the Veterans' Preference Act of 1944 to preference for employment in the federal civil service and preference to retention of employment in the federal civil service. This is simply and obviously not so. More than ninety years ago, the Supreme Court held: "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion." *United States v. Teller*, 107 U.S. 64 (1882). The principle has never been overruled or modified. It was reaffirmed in *Lynch v. United States*, 292 U.S. 559 (1934), where Justice Brandeis, for the High Court, wrote:

"War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. United States v. Teller, 107 U.S. 64, 68; Frisbie v. United States, 157 U.S. 160, 166; United States v. Cook, 257 U.S. 523, 527. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder."

See: Annotation, 52 ALR 2d 437.

A pension is the most direct and calculable of a government's bounties to ex-servicemen. *A fortiori*, with respect to a fringe benefit like a preferential right to retention in federal civil service employment. The *Lynch* distinction between contract rights and gratuities remains viable and was recently relied upon in *Carina v. United States*, E.D. Va., January 17, 1975 (unreported), in which the Court held that an agreement to extend enlistment entered into by a serviceman carried with it the Variable Reenlistment Bonus provided by 37 U.S.C. § 308 which could not be thereafter reduced by Congress' amendment of section 308 to substitute the Selective Reenlistment Bonus. The serviceman's rights were fixed by contract. That is not so in the present case. Cf. *Flemming v. Nestor*, 363 U.S. 602 (1960).[1]

Appellants also argue that the impact of the Dual Compensation Act of 1964 is unconstitutional because it arbitrarily discriminates against servicemen retired after twenty years' service

[1]*Flemming v. Nestor*, 363 U.S. 604 (1960), attracted four dissenters. When the Supreme Court splits five to four, it is, of course, arguable that the constitutional issues cannot be termed frivolous or wholly insubstantial. A review of the dissenting opinions will show, however, that the dispute was not with the enunciation of principles by the majority, but concerned the application of those principles to the facts of the particular case.

and that it violates constitutional prohibitions against ex post facto laws and bills of attainder. *Flemming v. Nestor, supra,* is a complete and controlling answer to each of these contentions. "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor, supra,* at p. 611; *United States v. Kras,* 409 U.S. 434, 446 (1973). The change made by Congress with respect to veterans' employment preference rights when it enacted the Dual Compensation Act of 1964 was deliberate and for sustainable reasons. See: 1964 U.S. Code Congressional & Administrative News, pp. 2834-2853. On the issues of ex post facto and bill of attainder, *Nestor,* in the context of a statute which had revoked supplicant's social security benefits, had this to say:

> "The remaining, and most insistently pressed, constitutional objections rest upon Art. I, § 9, cl. 3, and Art. III, § 2, cl. 3, of the Constitution, and the Sixth Amendment. It is said that the termination of appellee's benefits amounts to punishing him without a judicial trial, see Wong Wing v. United States, 163 U.S. 228; that the termination of benefits constitutes the imposition of punishment by legislative act, rendering § 202 (n) a bill of attainder, see United States v. Lovett, 328 U.S. 303; Cummings v. Missouri, 4 Wall. 277; and that the punishment exacted is imposed for past conduct not unlawful when engaged in, thereby violating the constitutional prohibition on ex post facto laws, see Ex parte Garland, 4 Wall. 333. Essential to the success of each of these contentions is the validity of characterizing as 'punishment' in the constitutional sense the termination of benefits under § 202 (n)."

The legislative history (1964 U.S. Code Congressional & Administrative News, p. 2834, et seq.) plainly shows that Congress was motivated by an intention to straighten out what it deemed to be an inequity flowing from the advantage bestowed upon career servicemen who, after twenty or more years, retired from service with retirement pay and then entered a new federal civil service career with an automatic seniority based on their years of military service which virtually locked them into their new

jobs, while career civil service employees, including non-retired veterans, were vulnerable to termination or reduction in grade at the time of any reduction in force. This was clearly a matter for legislative, not judicial, judgment and was not punitive.

In summary, then, these cases involve an attack on the constitutionality of amendments to a law (The Veterans' Preference Act of 1944) which was enacted to regulate the civil service system with respect to its hiring, retention and termination of federal civil service employees and was not enacted as conditions (incorporated by operation of law) of the enlistment contracts governing the employment of those entering military service. The seniority rights of retired servicemen vested only after they entered the federal civil service and passed the probationary period. These rights were carefully recognized and preserved by the Congress (78 Stat. 486, P.L. 88-488, sec. 202(b)(3), *supra*). Until then, whatever anticipations a serviceman entertained between 1944 and 1964 with respect to preferential advantage in the federal civil service were no more than some sort of floating expectancy entirely dependent upon the Government's bounty. A claim of unconstitutional deprivation cannot be built upon this foundation. The law is clear.

In the Monaco case, the District Court also denied injunctive relief for lack of equity, having found adequate administrative and legal remedies. While the argument is persuasive, we do not base our affirmance upon this ground.

The orders of the two district courts are affirmed.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES H. CAMP, et al., Plaintiffs, v. MELVIN R. LAIRD, Secretary of Defense, et al., Defendants.	Civil No. 70-1-S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DISMISSAL

This cause came on for further hearing on November 6, 1972 pursuant to the defendant's motion to dismiss the complaint as provided in Rule 12(b) F.R.C.P. Plaintiffs in this action petition this Court to empanel a 3 judge court pursuant to the provisions of 28 U.S.C. §2282. Plaintiffs appeared by Frederick L. Hetter and defendants appeared by Harry D. Steward, United States Attorney and Frederick Holoboff, Assistant United States Attorney. The Court having considered the pleadings, affidavits, supporting documents and arguments of counsel previously submitted, finds as follows:

FINDINGS OF FACT

1. Plaintiffs are citizens of the United States of America and of the State of California residing in the Southern District.

2. Plaintiffs are retired servicemen, with twenty or more years of active duty, who are Civil Service employees at the North Island Naval Air Rework Facility, North Island,

Coronado, California and as a result of any reductions in force ordered by the President and the Secretaries of Defense and Navy, may be reduced in grade or terminated from employment.

3. Plaintiffs seek declaratory relief and the empanelling of a 3 judge federal court on the ground that certain provisions of the Dual Compensation Act of 1964, specifically 5 U.S.C. §3501 and 3502, unconstitutionally discriminate against retired servicemen.

4. Plaintiffs contend that under the retention provisions of the Dual Compensation Act, plaintiffs are allowed no credit for their military service except for war time service, whereas another employee with under 20 years of military service is allowed full credit for his entire period of military service.

5. The legislative history of the Dual Compensation Act of 1964 is found in the 1964 U.S. Code Congressional and Administrative News, pp. 2834-2853. From this material the following has been gleaned.

(a) The Veterans Preference Act of 1944 accorded certain preferential treatment to veterans with regard to Civil Service opportunities, including both employment and retention preferences.

(b) The purpose of the Veterans Preference Act was primarily to assist those veterans who had interrupted their regular civilian careers to enter military service during time of war, and to prevent their being penalized, seniority-wise, vis a vis their non-veteran counterparts.

(c) An unforeseen consequence of the Veterans Preference Act was to bestow an inequitable advantage upon career servicemen, who, after twenty or more years, retired from service with retirement pay, and then

entered a new Civil Service career with an automatic seniority based upon their years of military service which virtually "locked them in" to their new jobs, while career Civil Service personnel, including non-retired veterans, were vulnerable to termination or reduction in grade in any reduction in force.

(d) Congress deemed it inequitable and detrimental to the career opportunities of non-retired veterans and career Civil Service civilians that the "latecomer" retired veteran should receive both a monetary recognition of his completed military career in the form of retirement pay, and full seniority credit for that same military service, amounting to a "super priority."

(e) In passing the Dual Compensation Act of 1964 Congress intended to eliminate the retention preference enjoyed by retired veterans by virtue of crediting them with full service time and adopt a "fresh start" principle, placing retired veterans drawing retirement or retainer pay more nearly on an equal footing with others entering Civil Service for the first time.

(f) Congress therefore defined "retired veteran" in 5 U.S.C. §3501 as a member of a uniformed service entitled to retirement or retainer pay, and removed from this class its preference eligibility and credit for military service other than wartime or campaign service (disabled veterans and those employed in Civil Service prior to enactment of the 1964 statute being exempted).

6. In view of the legislative history and from the face of the statute itself there is a distinction between retired veterans receiving retirement pay and non-retired veterans not entitled to such pay for purposes of according retention preferences in Civil Service.

7. There is a rational basis for such distinction, and the classification is not arbitrary or capricious.

CONCLUSIONS OF LAW

Insofar as any conclusion of law may be deemed a finding of fact, it is so found by the Court to be true in all respects, and vice versa.

1. The challenged classification established by the statute in question has a rational basis, and is not arbitrary or capricious.

2. The district court may review the intention of the Legislature in determining the constitutionality of any statute. Ludley v. Board of Supervisors of L.S.U., 150 F.Supp. 900, 902 (E.D.La. 1957).

3. The statutory provisions in question are constitutionally valid.

4. The claim of Constitutional invalidity is plainly insubstantial.

5. Where a claim that a statute is repugnant to the Constitution is plainly insubstantial, a single judge district court may dismiss the motion to empanel a three judge court pursuant to 28 U.S.C. §2282, Ex parte Poresky, 290 U.S. 30 (1933).

6. Plaintiffs' remaining claims for relief of which this Court has jurisdiction are all predicated upon the alleged Constitutional invalidity of the statute in question, and therefore, fail to state a claim upon which relief may be granted.

IT IS THEREFORE ORDERED

1. That plaintiffs' motion to empanel a three judge court and for temporary and permanent injunction is hereby denied.

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2. That plaintiffs' complaint herein is dismissed for failure to state a claim upon which relief may be granted.

DATED: November 10, 1972

GORDON THOMPSON, JR., Judge
United States District Court

Copies to:

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Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

James A. Carini, et als,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	
United States of America, et al,	)	No. 74-88-NN
	)	
Defendants.	)	

OPINION AND ORDER

This civil action was originally brought by numerous plaintiffs against the Secretary of Defense, the Secretary of the Navy, and various Naval officers, seeking to be released from the Navy on a writ of habeas corpus because of the government's failure to fulfill the terms of the plaintiffs' enlistment contracts. In an order entered November 21, 1974, we ruled that habeas corpus relief was inappropriate in this particular instance, and allowed the plaintiffs time to amend their complaint to state a cause of action for damages. Jurisdiction was originally based upon 28 U.S.C., §2241, §2201 and §2202, and, as amended, is now predicated upon 28 U.S.C., §1346, §2201 and §2202. For the reasons given below, the plaintiffs are entitled to monetary and declaratory relief as prayed for.

The plaintiffs enlisted in the Navy between June 1970 and July 1972. The time spread is not material as it appears that all signed a similarly worded enlistment contract. All contracts of enlistment were for a period of four years. Either concurrently with signing the initial enlistment contract or shortly thereafter while in "boot camp", each plaintiff signed an "Agreement

to Extend Enlistment." The relevant language of the extension agreement is as follows:

> "I * * *, in consideration of the pay, allowances, and benefits which will accrue to me during the continuances of my service, voluntarily agree to extend my enlistment as authorized by Section 509, of Title 10, United States Code, and the regulations issued pursuant thereto. I voluntarily agree to extend my enlistment for a period of 24 months from the date of expiration thereof, subject to the provisions and obligations of my said contract of enlistment of which this, my voluntary agreement, shall form a part. "REASON FOR EXTENSION: Training (Nuclear Field Program or Advanced Electronics (AEF) Field Program). AUTH: BUPERSMAN 1050300. I understand that this extension becomes binding upon execution and thereafter may not be canceled except as set forth in BUPERSMAN 1050150."

The extensions took effect and became binding on the day they were signed.

At the time each Extension Agreement was signed, 37 U.S.C., §308(g)(1968) was in effect.(1)

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(1) Section 308(g) was part of the Uniformed Services Pay Increase Act, set out in U.S. Code Cong. and Admin. News, 89th Cong., 1st Sess., at 600-605 (1965). The legislative history is set out in U. S. Code Cong. and Admin. News, 89th Cong., 1st Sess., at 2756-67 (1965).

Section 308(g) allowed the Secretary of the Navy to promulgate regulations whereby personnel with critical skills could either reenlist or extend their enlistment and be paid up to four times the bonus given to those who reenlisted or extended but did not possess a critical skill. It is a fact that, because of their advanced training, all plaintiffs possess a "critical skill."

On June 1, 1974, less than one month prior to the time when the two-year extensions were to begin for the first of the plaintiffs, a newly promulgated revision to 37 U.S.C., §308 went into effect. See U. S. Code Cong. and Admin. News, 93rd Cong., 2nd Sess., at 897-98 (1974). The old version of §308 would have allowed each of the plaintiffs to receive a bonus of between $4,000 and $6,000 for their two-year extension of service. The old bonus was called a Variable Reenlistment Bonus. The new version of §308 only authorized payment of a bonus of approximately $600 for a two-year extension of service. The Variable Reenlistment Bonus had been replaced by the Selective Reenlistment Bonus. Only by extending their enlistments for four years instead of two could the plaintiffs receive the $4,000 - $6,000 bonus to which they believe they are entitled.

The plaintiffs now seek to recover from the defendants the amount which they would have been paid had the Variable Reenlistment Bonus not been abolished.

Although not specifically referred to in the extension agreement, 37 U.S.C., §308 (1968) was a part of that agreement and the contract it formed. This is

so by operation of law. Morse v. Boswell, 269 F. Supp. 812, 814 (D.Md.), aff'd per curiam, 401 F.2d 545 (4th Cir., 1968), cert. denied, 393 U.S. 1052 (1969). See also Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 435 (1934); Rehart v. Clark, 448 F.2d 170 (9th Cir., 1970); Goldstein v. Clifford, 290 F. Supp. 275, 279 (D.N.J., 1968). Thus, the right to receive a Variable Reenlistment Bonus was an integral part of the contract formed between each plaintiff and the Navy since that was the law on the day the Extension Agreements were signed. Further, as we noted more extensively in our order of November 21, 1974, merely because a person in the military has changed his status, he does not forfeit the right to receive the benefit of his bargain as set out in the contract of enlistment.(2) Peavy v. Warner, 493 F.2d 748, 750 (5th Cir., 1974); Matzelle v. Pratt, 332 F. Supp. 1010 (E.D.Va., 1971).

The case before us falls between two lines of cases. The first line of cases holds that, in regard to the handling of military personnel, Congress has broad authority pursuant to its "War Powers." The second line of cases, completely unrelated to the first, holds that Congress does not have the authority to alter the terms of a contract between itself and other parties where the change is effected for fiscal reasons. Since the facts presently before us involve the alteration of a contract

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(2) The contract of enlistment includes the extension agreement as the language of the latter agreement merged the two documents into one contract.

with one in the military, we find ourselves between the two lines of reasoning. Our problem is increased because we can find no cases that even begin to discuss this dichotomy.

The government has cited two cases which have held that Congress can retroactively alter the terms of an enlistment contract pursuant to its War Powers. Schulte v. Clifford, 303 F. Supp. 963 (D.Minn. 1968); Pfile v. Corcoran, 287 F. Supp. 554 (D.Colo., 1968). See also United States Constitution, Art. I, Sec. 8, clauses 11, 12 and 14. Both of these cases, decided during the Vietnam conflict, concerned the narrow issue of whether Congress could retroactively alter the terms of an enlistment contract by changing the length of time the reserves could be called up from forty-five days to two years. In these cases, the plaintiffs enlisted in the reserves. Their contracts stated that, should they fail to attend a certain number of weekend drills, they would be subject to a call-up to active duty for forty-five days. After the enlistment contracts were signed, Congress, faced with manpower shortages during the Vietnam conflict, changed the period for which a dilatory reservist could be called up to two years. The courts upheld this change in the contract of enlistment as being within the Congress' War Powers of raising an army.

We feel these decisions are consistent with earlier holdings which have upheld the power of Congress to do such things as initiate a draft, Selective Draft Law Cases, 245 U. S. 366 (1918), and to extend the period

of military service during a war for those already in the military, Ex parte Taylor, 73 F. Supp. 161 (S.D.Cal., 1947). Yet, all of these cases deal only with the authority of Congress to effect the "status" of an individual vis-a-vis raising an army and a navy pursuant to Article I, section 8 of the Constitution. Under these powers, Congress can draft civilians, extend the service of those already in the military, and call up the reserves as Congress deems necessary. The broad reach of Congressional authority in these areas is unquestioned. See United States v. O'Brien, 391 U.S. 367 (1968). However, none of these cases deal with the problem now before us of whether Congress can retroactively alter the terms of a contract so as to reduce the amount of a bonus already agreed to.(3)

Larionoff v. United States, 365 F. Supp. 140 (D.D.C., 1973), held that the Secretary of the Navy cannot retroactively abolish the Variable Reenlistment Bonus by changing Naval Regulations. While we agree that many of the factual findings made by Judge Richey in Larionoff are appropriate here, the court's holding is not of much assistance because we feel that Congress possesses unique constitutional powers in regard to the military that the Secretary of the Navy does not possess.

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(3) Congress can abolish reenlistment bonuses where the abolition has only a prospective application. Brooks v. United States, 33 F. Supp. 68 (E.D.N.Y., 1938). While Congress, in Brooks, did abolish the reenlistment bonus, it did not require anyone to serve a term of reenlistment without a bonus.

Turning to the second line of cases, Congress does not have the power to retroactively alter the terms of contracts between itself and others for purely fiscal reasons. Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571 (1934). Although neither case involved contracts of enlistment, we believe the rationale behind those decisions is applicable in the case before us. In Lynch, Congress attempted to cancel War Risk Insurance contracts merely as an economy measure. The Supreme Court stated that a contract between the United States and an individual was a property right in that individual, and the government was bound as any party would be. Lynch, supra, at 576, 580. An attempt to cancel the insurance contracts merely as an economy measure was not within the power of Congress.

Perry v. United States, supra at 351, 354, supported the decision in Lynch. Perry had bought United States bonds which guaranteed payment in gold. The United States went off the gold standard and offered paper money to those redeeming the bonds. Although the Supreme Court did find that the government could thus alter the redemption terms of the bonds, they did so only after stating that this was permissible where the rights of the bondholder were not materially affected. Since the bonds continued to be guaranteed by the government, and the guarantee was for the full face amount of the bond, the plaintiff had not been adversely affected. We reiterate, however, the fact that, as in Lynch, the Supreme Court in Perry noted that Congress must be bound by the terms of its contracts. Perry at 351, 354.(4)

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(4) There are cases which hold that Congress may interfere with contracts between two persons where the government

(continued)

After closely examining the 1974 revisions to 37 U.S.C., §308, we feel that the action taken by Congress to retroactively revoke the Variable Reenlistment Bonus was prompted by purely fiscal reasons. Accordingly, we feel that the holdings in Lynch and Perry are applicable, and not the War Power decisions of Schulze v. Clifford, supra, and Pfile v. Corcoran, supra. In reading the legislative history of the new version of §308, we note that constant reference is made to the amounts presently being paid out in reenlistment bonuses and the savings possible under the revised, lower bonus schedule. See the Armed Forces Enlisted Personnel--Bonus Revision Act of 1974, U. S. Code Cong. and Admin. News, 93rd Cong. 2d Sess., at 1028-1044 (1974). Although the "Purpose of the Bill" is stated as being:

> "***to provide authority to grant enlistment and reenlistment bonuses to enlisted personnel on a selective basis to fill critical and shortage skill requirements in the armed forces***,"

the entire legislative history concerns merely the amount of money to be saved by reducing certain expenditures. While the stated "Purpose" seeks to bring the bonus cut under congressional War Powers as a measure to fill

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(4) (continued) is not involved, but Lynch and Perry noted that Congress is held more strictly to the contract where the government is a party. See Calhoun v. Massie, 253 U.S. 170 (1920); Hamilton v. Ky. Distilleries Co., 251 U.S. 146 (1919); Hoke v. United States, 227 U.S. 308 (1913); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

manpower shortages, we feel that the stated intent of Congress is far outweighed by the actual language of the Act, which shows that Congress' primary interest was fiscal savings. Accordingly, we feel that the decisions in Perry and Lynch are far more applicable, and Congress does not possess the authority to retroactively alter the terms of its contracts with the plaintiffs. The Variable Reenlistment Bonuses are rightfully owed to the plaintiffs and must be paid as set out below in the court's order.

For the record, we have considered two arguments put forth by the government and find both without merit. First, the doctrine of promisory estoppel is inapplicable because the plaintiffs do not rely on the improper representations of a Navy recruiter who might have promised a bonus to which the plaintiffs were not entitled. There is a distinction between the case now before us, and that of Parker v. United States, 461 F.2d 806 (Ct. Cl., 1972), cited by the government. In Parker, an enlistee was promised a reenlistment bonus even though the law clearly stated that no bonus was to be given. The enlistee sued for his bonus, not based on any statutory right, but upon the promise made by someone in the Navy. The court rejected the claim as the military cannot be bound by the promises made by its personnel. In contrast, the case before us is not a suit based upon a mere promise--although a bonus was promised. The suit here is based on what the government admits was the statutory bonus due to the plaintiffs up until the time that §308 was amended.

Secondly, the doctrine of illusory promise is not applicable because the bonus was not illusory in nature. We have already pointed out that the Variable Reenlistment Bonus was a part of the Extension Agreement, and the Extension Agreement was incorporated into the Contract of Enlistment. The extension became effective on the day it was signed, not at some time in the future. The Navy could have written a contract that stated that any change in the bonus laws would be binding on both parties, but they did not do so. See Larionoff v. United States, supra. See also Johnson v. Powell, 414 F.2d 1160 (5th Cir., 1969); Winters v. United States, 281 F. Supp. 289, 295 (E.D.N.Y.), aff'd per curiam, 390 F.2d 879 (1st Cir.), cert. denied, 393 U.S. 896 (1968). The mere fact that the Variable Reenlistment Bonus was not an exact sum certain is not material. The bonus was set out in a specific formula, the terms of which were most certain. In sum, we find nothing illusory about the promise of a Variable Reenlistment Bonus.

Accordingly, it is hereby ORDERED that, as to those plaintiffs who have already completed their initial four-year enlistment, the Navy proceed to pay them their Variable Reenlistment Bonus as provided by 37 U.S.C., §308, at the time they enlisted. As to those plaintiffs who have not yet completed their initial four-year enlistment, their request for declaratory relief is hereby GRANTED, and it is ORDERED that as they enter their two-year period of extension they be paid their Variable Reenlistment Bonus as provided by 37 U.S.C.,

§308, at the time they enlisted. The formula to determine the exact amount due each man is clear. Counsel will prepare and submit to the court within fourteen (14) days an order setting forth the exact amount due each plaintiff and when it is payable.

United States District Judge

At Norfolk, Virginia
January 17, 1975